UNITED STATES OF AMERICA
BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	) PR Docket No. 94-105 PR File No. 94-SP3
Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain State Regulatory Authority over Intrastate Cellular Service Rates	)

COMMENTS OF THE CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA ON THE PROTECTIVE ORDER PROPOSED TO PROVIDE ACCESS TO CONFIDENTIAL INFORMATION CONTAINED IN THE CALIFORNIA PETITION FOR STATE REGULATORY AUTHORITY

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SUMMARY

In commenting upon the proposed protective order prepared by the Private Radio Bureau, the Cellular Carriers Association of California must first note that such an order is completely unnecessary and will involve the FCC in a lengthy and wasteful dispute over the provisions of the Freedom of Information Act (FOIA), and potentially threaten the sufficiency of the Commission's final decision in this Docket by introducing substantial legal error.

Neither the California Public Utilities Commission (CPUC) nor the reseller trade associations which seek the carrier-specific data contained in the CPUC's filing need that data to make a case before the FCC. Aggregated information is more than adequate to illustrate the condition of the statewide cellular market. Should the FCC publicly disclose such information, it would be subject to reversal if a court determined that the confidential information was exempt from disclosure under the FOIA and the release of such information was, therefore, "not in accordance with the law."

In the event that the FCC feels compelled to disclose some or all of the data, it must carefully and thoroughly revise the proposed protective order submitted to the parties by the Private Radio Bureau as it is wholly

inadequate to protect cellular carriers from serious competitive harm as a result of misuse of the confidential data.

Finally, the CCAC contends that the investigative materials obtained by the CPUC from the California Attorney General are under no circumstances eligible for public disclosure and must be excluded from the public record in this proceeding permanently.

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Pursuant to the request of the Private Radio Bureau of the Federal Communications Commission ("FCC"), the Cellular Carriers Association of California ("CCAC") hereby responds to the draft protective order furnished to the parties in the above-captioned proceeding. As explained in previous filings in this docket, the CCAC is a trade association which represents the major cellular license holders in California in regulatory and legislative matters. CCAC has filed an

opposition to the Petition to retain rate regulatory authority filed by the Public Utilities Commission of the State of California (CPUC). In addition, on September 29, 1994 the CCAC filed an opposition to the request of the National Cellular Resellers Association (NCRA) for access to the confidential information filed under seal with the CPUC's Petition.

As explained in the latter pleading, the CCAC strongly opposes the request of NCRA. The CCAC also opposes the adoption of a protective order in this proceeding on several grounds. First, the information sought by NCRA is confidential and financial in nature, and exempted from disclosure under the Freedom of Information Act (FOIA).[1] Second, imposition of any protective order upon the cellular carriers by the FCC is completely inappropriate under these circumstances, and would burden the FCC's ultimate decision on the CPUC's petition with legal error. Third, the specific protective order proposed by the Private Radio Bureau provides wholly inadequate protection to the cellular carriers whose proprietary commercial information is subject to public disclosure. Fourth, and most importantly, the CPUC has not directly relied upon the vast majority of the carrier-specific confidential data provided under seal, instead supplementing the text of its petition with completely or partially aggregated information which does not expose carriers'

[1] 5 U.S.C. § 552(b)(4)

proprietary commercial information. The CPUC should withdraw the carrier-specific confidential data from its Petition and rely upon the aggregated information it has already provided to the FCC, instead of "acquiescing" in NCRA's efforts to make this information public.

I. The Remaining Redacted Information in the CPUC Petition Is Proprietary And Commercially Sensitive And Should Not Be Disclosed In This Proceeding

The CPUC originally filed its Petition to retain rate regulatory authority with the FCC in a highly redacted form.[2] Numerous appendices and textual references were entirely deleted from the publicly filed version of the Petition. While a great deal of the information redacted by the CPUC was not entitled to confidential status[3], the information which

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[2] Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain State Regulatory Authority over Intrastate Cellular Service Rates, filed August 9, 1994 in FCC GN Docket No. 93-252, redesignated PR File No. 94-SP3 and subsequently redesignated PR Docket No. 94-105. The CPUC also filed a sealed version of its Petition with the FCC at the same time which contained all the information redacted in the publicly filed version. Subsequently, by means of a written ex parte communication, the CPUC provided the FCC staff with eleven pages of revised text which included previously redacted information. In addition, the CPUC provided the majority of the information previously redacted from Appendices I and J. See Letter of Ellen LeVine to William F. Caton, dated September 13, 1994 and attachments.

[3] The majority of these appendices are merely a tabulation of cellular rate information taken from cellular carrier tariffs on file in the public records of the CPUC and simple calculations using such rate information. Information available in publicly filed tariffs is clearly not entitled to any confidential status.

remains redacted at this time is very clearly entitled to protection as confidential commercial and financial information. The disclosure of such information would cause substantial competitive harm, and such information is thereby exempted from disclosure by the FCC under Exemption 4 of the FOIA. 5 U.S.C. § 552(b)(4).

The remaining unredacted confidential information falls into two categories, as set forth in the letter from CPUC attorney Ellen LeVine to Regina Harrison of the FCC Private Radio Bureau dated September 13, 1994.[4] The first category of information is confidential subscriber and cell site capacity utilization data provided by the cellular carriers in response to two formal data requests made by a CPUC Administrative Law Judge (ALJ).[5] The second category consists of information obtained by the CPUC from employees of the California Attorney General.

A. Subscriber and Network Capacity Information

The first category of carrier-specific information represents a classic example of information exempt from disclosure under FOIA Exemption 4. The CPUC ALJ Ruling

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[4] Attached to the LeVine-Caton letter of September 13, 1994 cited previously.

[5] See Administrative Law Judge's Ruling Directing Parties to Provide Supplemental Information, CPUC Investigation I.93-12-007, April 11, 1994; and Administrative Law Judge's Ruling Directing Parties to Provide Further Supplemental Information, I.93-12-007, April 22, 1994, attached as Appendices A and B, respectively.

requested that carriers provide the total number of "units" or subscribers on all types of rate plans as well as an indication of whether such subscribers are retail or wholesale customers.[6] The second ALJ Ruling required carriers to disclose the capacity utilization of each of their cell sites by reference to a standardized scale of high, medium or low capacity utilization rates.[7]

The release of the subscriber data would cause substantial harm to a carrier's competitive position. Indeed, the ALJ assigned to the CPUC's cellular investigation has specifically ruled that release of even aggregated portions of the cellular carriers' subscriber data, "should be protected from public disclosure and treated confidentially" due to the competitive harm that such a release would cause.[8] In this Ruling the ALJ reversed a previous decision which would have made public aggregate numbers of subscribers on individual carriers' discounted and basic rate plans and the number of subscribers on retail and wholesale service plans. The ALJ observed that,

> "Even though in aggregate form, the disclosure of absolute numbers would still reveal the relative market shares of each respondent in each of the service areas identified in the original ALJ

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[6] April 11th ALJ Ruling, supra, at p. 4.

[7] April 22nd ALJ Ruling, supra, at pp. 1-2.

[8] Administrative Law Judge's Ruling Granting Motion For Modification of July 19, 1994 Ruling, CPUC I.93-12-007, issued August 8, 1994, at p. 4, attached hereto as Appendix C.

> request. Knowledge of market share could be used by a competitor to structure an advertising message claiming superiority over the carrier, based on total subscribers. If a competitor knew a carrier's specific number of subscribers by market area applicable to the various categories referenced in the July 19th Ruling, it could assess the carrier's strengths and weaknesses and adjust its marketing strategy accordingly."

Id. at 4. Similarly, if a competitor were to learn which cell sites in a competing network were most congested it could identify productive areas for seeking additional customers and potential targets for advertising campaigns claiming higher service quality.

In addition to causing substantial competitive harm if disclosed, this information was obtained from a person outside government (the cellular carriers), and it clearly involves commercial and financial information. These elements establish that it is entitled to protection from disclosure under Exemption 4 of FOIA. See Gulf & Western Industries, Inc. v. U.S., 615 F.2d 527 (D.C. Cir., 1979).[9]

B. Investigative Information Obtained By the California Attorney General

As explained in CCAC's earlier submissions in this Docket, neither CCAC nor the California cellular carriers are

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[9] While NCRA has not made a proper Freedom of Information Act request by means of its September 19, 1994 pleading, the Gulf & Western case is relevant here as it sets out the applicable standard for defining commercially sensitive confidential information which qualifies under Exemption 4 of the FOIA, which is the standard by which the FCC must consider the NCRA request.

aware of the content of the information obtained by the CPUC from the office of the Attorney General. The CPUC described this information in its request for confidential treatment as, "materials provided to the CPUC by the Office of the Attorney General of the State of California gathered in the course of an ongoing investigation of the cellular industry within California to determine compliance with antitrust laws."[10] While the CCAC is limited to speculating upon the content of this investigative material, it does appear likely, from the context of the passages surrounding the redacted investigative material, that the CPUC has obtained from the Attorney General, and has quoted in its Petition, documents which discuss the proprietary marketing plans of specific cellular carriers, and in particular, aspects of those marketing plans discussing market share, rates, and contract terms to be offered to customers in new service plans.[11] Any such material would clearly qualify for confidential status under Exemption 4 of FOIA for precisely the same reasons as the subscriber and capacity information discussed above. Given the ability to examine a carrier's marketing strategy, a reseller or a competing carrier could alter their own marketing to substantially improve their competitive position.

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[10] Request for Proprietary Treatment of Documents Use Din Support of Petition to Retain Regulatory Authority over Intrastate Cellular Service Rates, filed August 9, 1994 in GN Docket No. 93-252, at p. 2.

[11] See CPUC Petition at pp. 42, 45, and 75.

The carrier-specific material provided to the CPUC by the Office of the Attoroney General of the State of California would also be exempt from disclosure under FOIA's Exemption 7.[12] Disclosure of information contained in the Attorney General's investigation could be exploited by a competitor if that competitor were to imply to the public that a specific carrier is engaged in unlawful conduct. The resulting prejudicial effect could deprive cellular carriers of their right to an impartial adjudication of the matters under investigation, which presents sufficient grounds under FOIA for exemption from disclosure.

In moving to reject the CPUC Petition or, in the alternative, the redacted information, and in opposing the NCRA request for disclosure, CCAC has previously explained that the CPUC has erred in relying upon California Government Code section 11181 as authority to justify this disclosure of confidential investigative files. CCAC will not repeat this argument other than to indicate that neither the FCC nor the CPUC are agencies charged with the enforcement of anti-trust laws, which is the subject matter of the Attorney General investigation. Thus, the disclosure of investigative information to either or both agencies cannot be justified under the terms of Government Code §11181(f) which states that, in connection with investigations and actions, the

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[12] 5 U.S.C. § 552(b)(7)
5 U.S.C. § 552(b)(7)(B)

department may:

> Divulge evidence of unlawful activity discovered . . . from records or testimony not otherwise privileged or confidential, to the Attorney General or to any prosecuting attorney who has a responsibility for investigating the unlawful activity discovered, or to any governmental agency responsible for enforcing laws related to the unlawful activity discovered.

(Emphasis added.) As explained in the CCAC motion to reject the CPUC petition or reject the redacted information[13], the release of such material to the CPUC was itself violative of California law and any subsequent indirect disclosure in the FCC proceedings is equally inappropriate. The FCC should not participate in the unlawful disclosure of this investigative information. The CCAC urges the FCC to exclude this information from the public record in this Docket and to return the investigative material to the CPUC at the earliest possible time.

II. Disclosure Of The Cellular Carriers' Confidential Information Through A Protective Order As Proposed By NCRA Would Not Be In Accordance With Law And Would Warrant Judicial Intervention

As explained above, confidential commercial and financial information is entitled to protection from disclosure under the provisions of the FOIA if a showing can be made that substantial competitive harm will result. The standard for determining whether the disclosure of commercial information

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[13] Motion of the Cellular Carriers Association of California to Reject Petition Or, Alternatively, Reject Redacted Information, PR File No. 94-SP3, PR Docket No. 94-105, filed September 19, 1994, pp. 6-12.

possessed by a government agency would likely cause substantial harm to a firm's competitive position was set forth in Gulf & Western Industries, Inc v. United States, 199 U.S. App. D.C. 1, 615 F.2d 527 (D.C. Cir. 1979). There, the D.C. Circuit said that in order to show the likelihood of substantial competitive harm, it is not necessary to show actual competitive harm, it only must be determined that substantial competitive harm would result from disclosure of information and the information at issue is the type which is not normally released to the public. (Id. at 530) The court found in this case that a firm's profit rate, actual loss data, general and administrative expense rates, projected scrap rates, and learning curve data are confidential under that standard. The number of subscribers and the availability of cellular network capacity (essentially equivalent to inventory levels for a cellular carrier) is equally sensitive information for a licensed cellular carrier.

National Parks and Conservation Assn. v. Morton, 478 F.2d 765, 770 (D.C. Cir. 1987) described in greater detail the competitive harm test used to determine whether material falls under FOIA Exemption 4. Under that test, information must be either within the scope of an evidentiary privilege or "confidential." To be confidential, information must be (1) of a type the submitter would not and has not disclosed to the public and (2) information the disclosure of which either (a) would cause competitive harm or (b) would cause harm to a

government program. Sensitive cellular subscriber and network capacity information meets this test by any objective standard.

The test announced in National Parks was modified in Critical Mass Energy Project v. NRC, 830 F.2d 278, 879-880 (D.C. Cir. 1987), to address situations where information was voluntarily provided to a government agency. There, the D.C. Circuit held that information provided to the government is exempt from disclosure if (1) it is provided voluntarily and (2) it is of a kind the provider would not customarily make available to the public.

Both the National Parks and Critical Mass standards are equally applicable to the FCC in determining whether information submitted to the FCC is properly withheld from disclosure. See Allnet Communication Services, Inc., v. Federal Communications Commission, 800 F.Supp. 984 (D.D.C. 1992). Under either standard the material originally submitted by the California cellular carriers meets the tests for exemption. The voluntary/involuntary distinction in the submission of data to an agency is of some interest in this proceeding as a result of the fact that the CPUC voluntarily filed its Petition with the FCC and included confidential information obtained from third parties (the cellular carriers) in its Petition. At the same time, the disclosure on the part of the cellular carriers was clearly not voluntary as it was compelled by a ruling of a CPUC ALJ. However, any

ambiguity raised by these circumstances is irrelevant as the information provided by the cellular carriers to the CPUC, and the apparent character of the investigative materials obtained by the CPUC from the Attorney General, fall within the scope of both the National Parks test for involuntary disclosures and Critical Mass test for voluntary disclosures.

It must be understood that an attempt to disclose extremely sensitive confidential information in this proceeding will place the FCC in a difficult position. Any FCC decision to release such information is subject to judicial review as to whether it is in accordance with the law. The Supreme Court in Chrysler Corp. v. Brown, 441 U.S. 281 (1979), held that while a firm cannot obtain an injunction against disclosure of information under the FOIA because the FOIA does not prohibit disclosure, a firm can nevertheless obtain injunctive relief against disclosure under Section 706 of the Administrative Procedure Act (APA) if the firm can establish that disclosure is "not in accordance with law." 441 U.S. at 317. The Court noted that Section 10(e) of the APA 5 U.S.C. Section 706, states that a reviewing court shall

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be-
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;[14]

[14] 441 U.S. at 318.

The Court determined that the agency's proposed disclosure of information was not "authorized by law" within the meaning of 18 U.S.C. §1905 because the regulation lacked a nexus with the legislative authority Congress delegated to the agency and the regulation was only an interpretative regulation rather than a legislative regulation. Similarly, because the information sought to be disclosed in the matter at hand qualifies for exemption from disclosure under FOIA Exemptions 4 and 7, such a disclosure can be enjoined as "not in accordance with law" under APA Section 706 and 18 U.S.C. Section 1905.

The courts' authority to review an agency's determinations regarding the applicability of Exemption 4 of FOIA was reinforced by the Ninth Circuit in Pacific Architects & Engineers, Inc. v. United States Dep't of State, 906 F.2d 1345 at 1347, where the court considered whether a State Department decision to disclose a contract was arbitrary and capricious. In that particular case the court ruled that such disclosure was "in accordance with the law", as the agency engaged in adequate factfinding prior to making its decision Id. at 1348. As indicated in greater detail below, CCAC asserts that neither the FCC nor the CPUC can justify the necessity for releasing the remaining redacted information contained in the CPUC Petition.

III. The Proposed Protective Order Is Wholly Inadequate

Assuming arguendo that the FCC were able to issue a protective order disclosing some limited portion of the

confidential information contained in the sealed CPUC Petition, the draft protective order[15] served upon the parties by the Private Radio Bureau in anticipation of the September 30, 1994 conference call is grossly inadequate to provide any protection to the cellular carriers who would be competitively harmed by such disclosures. The CCAC identifies below eight critical flaws in the proposed protective order, each of which would have to be remedied, at a minimum, before a protective order could provide carriers any shelter from substantial competitive harm. However, CCAC repeats that it does not concede that any protective order can be lawfully imposed upon the cellular carriers in this proceeding, given that the confidential information at issue is unquestionably protected from disclosure under Exemptions 4 and 7 of the FOIA.

A. The Proposed Protective Order Fails to Identify All the Confidential Information at Issue

The staff of the Private Radio Bureau seeks to identify all references to the redacted confidential information in Paragraph 2 of the proposed protective order. However, reference to the redacted material in Appendix H of the CPUC Petition is made on page 35 of the Petition, but is omitted from paragraph 2.c. of the proposed protective order. This reference appears to be derived from confidential data

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[15] Attached hereto as Appendix D.

involving the number of subscribers of one or more carriers. Any information involving the actual number of subscribers on a carriers system is highly confidential.

B. The Proposed Protective Order Does Not Adequately Protect Against Disclosure to Competitors of Cellular Carriers

The single most serious flaw in the proposed protective order is that it does not sufficiently guard against competitors making improper use of the confidential information which may be released pursuant to this order. The proposed protective order allows confidential information to be released to counsel for resellers, other carriers, or indeed any party. See paragraph 3 of Appendix D. There is no limitation against disclosure to counsel or employees or consultants who may also play a role in developing marketing strategies for competing against the same cellular carriers whose confidential information is subject to disclosure. This is clearly unfair and inappropriate.

Even the CPUC has required more stringent protections against competitive damage to the cellular carriers in its own proceedings. An ALJ Ruling was issued in CPUC I.93-12-007 which addressed the treatment of confidential subscriber and capacity utilization data. While the ALJ permitted parties to negotiate their own non-disclosure agreements, the Ruling did require that any disclosure of confidential information be limited to attorneys for the Cellular Resellers Association, associated paralegals and employees, or unaffiliated experts

who are not "advising or otherwise assisting resellers in devising marketing plans to compete against cellular carriers." [16]

At the very minimum the proposed protective order should contain equally stringent language prohibiting counsel, employees, or consultants with any role in marketing whatsoever from obtaining the subscriber and capacity utilization information.[17] As indicated below, each person seeking access to the confidential information at issue must sign a statement verifying under oath that he or she is not engaged in such marketing activities in any way.

C. The Proposed Protective Order's Ban Against Competitive Uses of the Information Is Completely Ineffective

Paragraph 5 of the proposed protective order seeks to bar improper use of the confidential information for business purposes or for any purpose other than for use in this proceeding. However, without a prohibition against disclosure to individuals with marketing responsibility or access to persons who have such responsibilities, such a prohibition is meaningless. Nor does the proposed protective order require any person receiving the information to execute any non-

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[16] Administrative Law Judge's Ruling Granting in Part Motions for Confidential Treatment of Data, CPUC I.93-12-007, issued July 19, 1994, at p. 7, attached hereto as Appendix E.

[17] As explained above, CCAC objects to any disclosure of the investigative material obtained from the Attorney General to any party whatsoever under any circumstances.

disclosure agreement. The proposed protective order simply does not contain sufficient concrete protections to fulfill its intent.

D. The Proposed Protective Order Does Not Require That All Persons Receiving Confidential Data Sign a Non-disclosure Agreement

As explained immediately above, the specific procedures for obtaining access to confidential information under the terms of the proposed protective order are woefully inadequate. The procedures outlined in paragraphs 6.a., 6.b., and 6.c. appear to require the completion of an "Attorney Application For Access To Materials Under Protective Order." CCAC believes a comprehensive non-disclosure agreement must be signed by <u>all persons</u> seeking access to the confidential information, not merely counsel, and the signed document must be served upon the FCC, the CPUC, and each cellular carrier whose confidential data is contained in the CPUC's Petition and Appendices. In addition, each such non-disclosure agreement must contain include a statement under oath that the individual is eligible to obtain the data (i.e., he or she has no responsibilities in advising or assisting any competitor of any cellular carrier in devising marketing plans to compete with cellular carriers) and that the individual commits to abide by all the provisions of the proposed protective order including the prohibitions against use in any other proceeding or for any business purpose.

E. The Proposed Protective Order Provides for the Submission of Protected Information to the FCC in Separate Sealed Filings, but Fails to Address Service on Other Parties

The procedures outlined in paragraph 7 of the proposed protective order are also inadequate. These provisions call for the service of pleadings containing reference to confidential information upon the FCC in a separately filed document. However, this paragraph does not even discuss service of such information on other parties or their counsel. Clearly, all other parties who are represented by counsel eligible to receive confidential information should also be served with the separate documents containing the confidential information. Frankly, CCAC is distressed by such broad distribution of confidential information. A far better course is to simply exclude such information from the record in favor of aggregated information which is not as commercially sensitive. However, if the FCC actually orders the release of any portion of the confidential information at issue, these procedures will become essential to provide all parties with equal ability to evaluate and comment upon the pleadings of parties which reference the confidential information.

F. The Proposed Protective Order Should Contain an Outright Ban on the Use of the Confidential Information for Any Purpose Whatsoever in Any Other Proceeding or Forum.

The provisions of paragraph 5 of the proposed protective order should be expanded to specifically ban the use of any

confidential information obtained pursuant to this protective order in any other legal proceeding, be it before the courts or an administrative agency. As presently structured, the proposed protective order embodies this principle only very narrowly, and in the negative. Instead of saying that the information should not be used "other than in this proceeding", the FCC should specifically ban the use of such information in other forums in straightforward language so that any violations will be readily apparent to a court not directly familiar with these proceedings.

G. The Proposed Protective Order must Recognize That it Is the Cellular Carriers' Rights to Confidentiality Which Are Being Compromised by Even a Limited Disclosure, and Not Those of the CPUC, Which Intends to Subvert Those Rights.

One of the most disturbing aspects of this proceeding is that the CPUC has violated its obligation to not disclose confidential information except upon compliance with its own statutes and regulations. The confidential interest in the cellular subscriber and capacity utilization data contained in the CPUC Petition belongs to the cellular carriers, first and foremost. Yet without an order of the full CPUC, as required by both Section 583 of the California Public Utility Code and CPUC General Order 66-C, the CPUC has introduced highly confidential information into a public proceeding of a federal administrative agency whose records are subject to the Freedom of Information Act. If the CPUC was unaware that the FOIA and